

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GERALD SWINDOLL, D/B/A
GERALD SWINDOLL FARMS

PLAINTIFF

vs.

Civil Action No. 2:98cv140-D-B

BL DEVELOPMENT CORP., IN CONCERT WITH
GRAND GAMING CORP., SHEA LEATHERMAN,
INDIVIDUALLY AND D/B/A RIVERFIELD FARMS AND
ANY OTHER AFFILIATED CORPORATIONS,
PARTNERSHIPS OR INDIVIDUALS WHICH HAVE OR
ARE IN ANY WAY FARMING THE DESCRIBED
PROPERTY, AND JOHN DOES 1-5

DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the plaintiff to remand this cause to the Circuit Court of Tunica County, Mississippi. Finding that the motion is well taken, the court shall grant the motion and return this matter to state court for ultimate resolution.

. Standard for a Motion to Remand

A motion to remand based upon defects in the removal procedure must be made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c). However, this court is required to remand any action over which it has no subject matter jurisdiction at any time before final judgment. 28 U.S.C. § 1447; Burks v. Amerada Hess Corp., 8 F.3d 301, 304 (5th Cir. 1993); Buchner v. F.D.I.C., 981 F.2d 816, 817 (5th Cir. 1993); In re Wilson Industries, 886 F.2d 93, 96 (5th Cir 1989). Consequently, an objection to the subject matter jurisdiction of this court may be raised by any party at any time in the course of these proceedings, and may even be raised by the court *sua sponte*. See Mall v. Atlantic Financial Federal, 127 F.R.D. 107 (W.D. Pa. 1989); Glaziers, Glass Workers of Jacksonville v. Florida Glass & Mirror of Jacksonville, 409 F. Supp. 225, 226 (M.D. Fla. 1976); 28 U.S.C. § 1447.

The defendant, BL Development Corporation, in its petition for removal, asserts that this court has jurisdiction over this cause based on complete diversity of citizenship among the parties

involved. See 28 U.S.C. § 1332. There is no other arguable basis for federal jurisdiction in this case. If the plaintiff's citizenship is not diverse as to all of the defendants, this court does not even possess jurisdiction to hear this action. Jernigan v. Ashland Oil, 989 F.2d 812, 814 (5th Cir. 1993). BL Development contends that the plaintiff fraudulently joined one of the defendants, Mr. Shea Leatherman, in order to defeat diversity. All parties appear to agree that defendant Leatherman, is a resident of Mississippi, and therefore a non-diverse party to the plaintiff. Nevertheless, BL Development asserts his citizenship should not be considered in determining this court's jurisdiction. Jernigan, 989 F.2d at 815. The task before this court is clear - if Leatherman was fraudulently joined as a defendant, remand to the state court is improper. If, however, Leatherman was not fraudulently joined in this action, this court has no jurisdiction to hear this case and this court must remand this cause back to state court. The non-movant carries an extremely heavy burden in establishing fraudulent joinder by clear and convincing evidence. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing, Inc., 663 F.2d 545, 549 (5th Cir. 1981). In any event, the standards used to determine whether a party has been fraudulently joined are well established within the Fifth Circuit:

Where charges of fraudulent joinder are used to establish [federal] jurisdiction, the removing party has the burden of proving the claimed fraud. . . . To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992). A second method to establish fraudulent joinder is by showing that there was outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. Finally, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., Inc., 789 F. Supp. 1374, 1376-77 (S.D.

Miss. 1991).

This court is not to "pre-try" the case in determining removal jurisdiction, but it may consider summary judgment-type evidence such as affidavits and deposition testimony. Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 262 (5th Cir. 1995) ("While we have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction, we have also endorsed a summary judgment-like procedure for disposing of fraudulent joinder claims."); Ford v. Elsbury, 32 F.3d 931, 935 (5th Cir. 1994); Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990). While not required to do so, plaintiffs may submit affidavits and deposition transcripts to supplement the factual allegations in their complaint. Lackey v. Atlantic Richfield Co., 990 F.2d 202, 208 (5th Cir. 1993). "Piercing the pleadings' in this fashion is permitted so as to avoid a plaintiff's depriving diverse defendants of a federal forum by mere conclusory allegations which have no basis in fact." Doe v. Cloverleaf Mall, 829 F. Supp. 866, 870 (S.D. Miss. 1993). As noted, the inquiry in this regard is similar to that used in a motion for summary judgment. LeJeune v. Shell Oil Co., 950 F.2d 267, 271 (5th Cir. 1992).

II. Possibility of Recovery Against Defendant Leatherman

In his complaint, the plaintiff charges that defendant Leatherman acted in concert with BL Development in breaching its contract with the plaintiff. BL Development entered into a contract with Swindoll in January 1994, which provided that Swindoll was to farm certain portions of BL Development's land. Said contract was to expire December 31, 1998. The lessor, BL Development, in its absolute discretion and at any time could determine that it be "necessary or desirable *in connection with its development activities* on or about the premises to utilize or disturb any portion [of the land contracted out to Swindoll]." (emphasis added). Exhibit 1 to Complaint, Contract ¶ 5. Upon such determination, the contract provided that BL Development was to give reasonable notice to plaintiff and set forth certain criteria in the notice. Exhibit 1 to Complaint, Contract ¶ 5.

Plaintiff alleges that "[o]n or about November, 1995, Defendant, BL Development, through

its agent, notified Plaintiff that all land rented by Plaintiff would be developed and would no longer be available to be farmed.” Complaint ¶ 4. Plaintiff further states “that in the late fall of 1995, upon completion of his harvest, and as he prepared to vacate the property, the tractors and . . . equipment of Defendant Leatherman were observed to be working said property that was no longer to be farmed . . .” Complaint ¶ 5. Plaintiff alleges that it was at that point that he realized that the contract was breached and had been violated. Complaint ¶ 5. Specifically, plaintiff alleges Leatherman intentionally interfered with BL Development and his existing contract. Mississippi has long recognized the tort of interference with existing contracts. See Liston v. Home Ins. Co., 659 F. Supp. 276, 280-81 (S. D. Miss. 1986)(“One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other . . .”).

Upon review of the submissions to this court and the record as a whole, it is the opinion of this court that the plaintiff has stated sufficient facts to constitute an actionable claim for the common law tort of wrongful interference with a contract against defendant Leatherman. The defendant, BL Development, has failed to overcome the heavy burden placed upon it in this motion to remand. This court notes that the alleged notices of cancellation of the contract were not provided to this court. As a result, the court is unable to examine such and determine if said notices met the contractual requirements.

That the plaintiff may be unlikely to recover is not this court’s inquiry - rather, the *possibility* of recovery is this court’s concern. When considering all of the relevant facts and uncertainties of state law in the light most favorable to the plaintiff, the undersigned cannot say that the plaintiff has no possibility of recovery against defendant Leatherman.

As this court finds that the plaintiff has a possibility of recovery against defendant Leatherman, this court need not address the merits of any of the plaintiff’s claims against him. In light of the fact that the plaintiff does indeed have a potentially viable claim against a non-diverse defendant, this court does not possess jurisdiction over this cause by virtue of the citizenship of the

parties involved. Remand of this action is proper, and this court shall grant the plaintiff's motion to remand.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

United States District Judge

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PROPERTY, AND JOHN DOES 1-5

DEFENDANTS

ORDER GRANTING
MOTION TO REMAND

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

-) the plaintiff's motion to remand is hereby GRANTED;
-) this cause is hereby REMANDED to the Circuit Court of Tunica County,
Mississippi.

SO ORDERED, this the _____ day of April 2001.

United States District Judge